IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

G. A. PEHRSON,
Appellant,

vs.

C. B. LAUCH CONSTRUCTION CO.,
a Corporation,
Appellee.

No. 14933

Appeal from the United States District Court for the District of Idaho, Northern Division.

APPELLEE'S BRIEF

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KERSHAW'S, INC.

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JURISDICTION

Appellee accepts the jurisdictional statement of appellant.

RESTATEMENT OF THE CASE

Appellant's statement is more a recitation of the allegations of his complaint than a statement of the evidence in the record and is entirely insufficient for review of the questions involved on appeal. For that reason a restatement of the evidence is necessary.

In November, 1951, appellant, an architect, was employed by School District No. 82, Bonner County, Idaho, to prepare plans and specifications for, and to supervise construction of, a school building at Cocolalla, Idaho (Tr. 28, 29). In May of 1952 the school district and appellant construction company entered into contract for construction of the building and work was immediately commenced (Tr. 89, 90, 152, 153). Under his contract of employment as architect, appellant was required to, and did make weekly inspections of the building as construction progressed (Tr. 30-31, 90).

Appellant had practiced his profession as an architect for 50 years (Tr. 87) and in that time supervised the construction of sixteen hundred to two thousand buildings (Tr. 88). On building inspections he had used portable ladders on thousands of occasions and was thoroughly familiar with the use of all types of ladders and the problems encountered in such use

(Tr. 89). He had sustained six or seven previous falls from loss of balance in using ladders with resulting injuries (Tr. 89).

On September 12, 1952 appellant, in company with Mr. Hurst, a school district director, visited the construction site for inspection (Tr. 32). After completing inspection within the building appellant was requested by Hurst to inspect the roof (Tr. 32, 98). Access to the roof was had by means of a sixteen foot portable ladder of solid construction (Tr. 98, 157). Procedure was to climb the ladder, step off onto a three foot concrete ledge or canopy over the main entrance to the building, and then step over a three foot eigh inch parapet wall onto the roof. The ladder was used in this fashion by laborers on an average of fifty times a day (Tr. 145, 146, 157-161, 166-168, 175, 187-189, 195, 196, 201). Appellant had used this ladder as access to the roof on ten to fourteen previous occasions (Tr. 92-94, 107, Ex. 13).

On September 12 Mr. Hurst first ascended the ladder and stepped off onto the roof (Tr. 32, 99-100). As Hurst ascended appellant stood on the ground, his left hand resting on the ladder (Tr. 99). When Hurst stepped off the ladder, appellant felt it shift to the left about two inches at the bottom and four to six inches at the top (Tr. 101). Although appellant realized the probability of trouble if the ladder was off balance, he immediately started up the ladder with-

out taking even the simplest precaution to see if the ladder standards were solidly set on level ground and securely set against the building or if in danger of further shifting (Tr. 101-116, Ex. 13). As appellant stepped off the ladder to the ledge, the ladder shifted again and appellant lost his balance and fell, sustaining injury (Tr. 33).

Customary precaution in construction work requires a check to see that a portable ladder is solidly set before ascending (Tr. 146, 147, 161, 167, 178, 192, 202, 207-208, 211). Appellant was familiar with this simple but necessary precaution (Tr. 94-95) but failed to exercise it (Tr. 101-116). Appellant was admittedly and voluntarily subjecting himself to danger in ascending a ladder not solidly set upon the ground or against the building (Tr. 110-113). In failing to exercise any precaution for his own safety, appellant admits that he knowingly "took a chance" that accident and injury would not result (Tr. 102, 108, 113).

It is for the injury sustained as a result of his failure to exercise any precaution for his own safety and in voluntarily taking a chance by subjecting himself to a known danger that appellant seeks recovery in this action. The District Judge reluctantly denied appellee's challenge to the sufficiency of the evidence (Tr. 143) and motion for directed verdict (Tr. 218) and then denied appellant's motion for new trial upon the ground that the evidence conclusively shows ap-

pellant to have been guilty of contributory negligence as a matter of law (Tr. 21-22).

ARGUMENT

Answer to Specification of Error No. 1

Appellant complains of the trial court's action in withdrawing from the jury an allegation of negligence on account of the accumulation of waste material and rubbish on the construction site (Tr. 153). No contention is made that a pile of rubbish caused appellant's fall. It is only contended that appellant's injuries *might* not have been so severe had he not landed on a pile of debris containing some broken concrete blocks (App's. Brief 8). Unused and waste construction materials do gather about a construction site and are hauled away when sufficient accumulates (Tr. 76). Appellant admitted that the debris on which he fell "was just loose rubbish of the usual type that you find around construction jobs that had been gathered in one pile for disposal" (Tr. 115).

There is in the record no evidence that appellee had violated any established construction practice in this regard, no evidence that the debris complained of was a proximate cause of appellant's fall, and no evidence, as appellant infers, that it had been allowed to accumulate for an unreasonable length of time. The trial court's action in striking the allegation was correct.

ANSWER TO SPECIFICATION OF ERROR NO. 2

Error is assigned on refusal of the trial court to admit appellant's Exhibit 1, a copy of the Idaho Minimum Safety Standards and Practices for the Building and Construction Industry adopted by the Industrial Accident Board of the State of Idaho. The offer was rejected upon the ground that the court would take judicial notice of the contents of the exhibit as a part of the law of the State of Idaho and such ruling then met with the apparent approval of counsel for appellant (Tr. 54-56, 141). The trial court can and should take judicial notice of whatever is established by law and of the public and private official acts of the legislative, executive and judicial department of the State of Idaho and of the United States. *Idaho Code,* Section 9-101; *McFall v. Arkoosh,* 37 Idaho 243, 215 Pac. 978; *Ineas v. Union Pacific Railroad Company,* 72 Idaho 390, 241 Pac. 2d 1178; *Standard Oil of California v. United States,* 107 F. 2d 402 (Ninth Circuit); *Milwaukee Mechanics' Insurance Co. v. Oliver,* 139 F. 2d 405 (Fifth Circuit).

ANSWER TO SPECIFICATION OF ERROR NO. 3

Error is assigned on the trial court's refusal to give plaintiff's requested instructions Nos. II, III, IV, V, VI, VII and VIII. Appellant's brief contains no argument or citation of authorities in support of any alleged error in the refusal of the trial court to sub-

mit his requested instructions.

Nor are the instructions set forth *totidem verbis* as required by Rule 20 (2) (d) of Rules of this honorable Court.

An assignment of error relating to instructions is deemed abandoned where assignment is not argued or discussed in the brief. *Moore v. Tremelling,* 100 F. 2d 39 (Ninth Circuit); *Forno v. Coyle,* 75 F. 2d 692 (Ninth Circuit); *Mutual Life Insurance Company v. Wells Fargo Bank and Trust Company,* 86 F. 2d 585 (Ninth Circuit); *Bank of Eureka v. Partington,* 91 F. 2d 587 (Ninth Circuit); *Hayward v. Yost,* 72 Idaho 415, 242 Pac. 2d 971; *Gough v. Tribune-Journal Co.,* 75 Idaho 502, 275 Pac. 2d 663.

Appellant's requested instruction No. 5, quoted on page 14 of his brief, was properly refused as it contains reference to the collection and storage of waste material, an issue withdrawn from the jury's consideration and because the provisions of the Idaho Minimum Safety Standards and Practices are not applicable to this case.

Idaho Code, Sec. 72-1101 empowered the Industrial Accident Board to "adopt reasonable minimum safety standards * * * to render employees and places of employment safe." The standards adopted are for the protection of workmen and create reciprocal duties as between employers and employees. The standards adopted pursuant to the statute do not purport to

create any statutory duty as between employers and the general public. The duties existing as between the employers and the general public are those required by common law. As to the duties required of the appellee by the common law in this case, the jury was properly instructed that "it was the duty of the plaintiff as the architect of the building to make his inspections promptly and it was the duty of the defendant in the construction of said school building to take all necessary precautions for his safety while making such inspection." (Tr. 224)

As the safety standards and practices adopted create no new duty on the part of employers toward the general public and as the appellant Pehrson was not an employee of the class for whose protection the standards were adopted, he cannot assert a claim of liability based on an alleged violation of such standards.

"In every case in which a statute makes it the duty of individuals or corporations to do or refrain from doing something for the benefit, advantage, or protection of others, an injured person complaining of a neglect of the statutory duty must, in order to maintain an action for damages, be a member of the class which the statute was enacted to protect. Only those for whose benefit and advantage the law was made have a right of action for injuries consequent upon its violation." 38 *Am. Jur.* 835 and cases cited.

Part I, Sec. 1.4 of the Idaho Minimum Safety Standards and Practices makes "employers and employees jointly responsible for the observance of the applicable codes and safety measures." Apparently the provisions of the safety standards and practices which appellant deems material are those appearing in Sections 4.66 and 4.67 of Part IV under the heading "Portable Ladders": to the effect that "In the use of ladders from the ground, the lower end shall be placed on a solid footing to prevent it sinking into the earth" and "If top of ladder is in danger of slipping or tipping, it shall be securely tied or fastened."

It is obvious that these two sections pertain more directly to employees engaged in the actual performance of work and in the use of portable ladders than to employers acting only in a supervisory capacity. Consequently, if appellant maintained a position similar to that of a workman or employee and if the safety standards are applicable in this case it must be held as a matter of law that appellant's admitted violation of the sections referred to constituted negligence on his part barring any recovery.

Answer to Specification of Error No. 4

Appellant assigns error on refusal of the trial court to permit a reopening of his case to permit the witness Hurst to testify (Tr. 143). The proferred testimony of the witness Hurst was merely cumulative of that given by appellant (Tr. 215).

The denial of a motion to reopen the case for introduction of further testimony is within the discretion of the trial court and his action will not be reviewed except in case of manifest abuse of that discretion. *Gardner v. United States,* 71 F. 2d 63 (Ninth Circuit); *Froman v. First National Bank,* 35 Idaho 10, 204 Pac. 145; *Hall v. Jensen,* 14 Idaho 165, 93 Pac. 962.

It is within the discretion of the trial court to admit or reject evidence that is merely cumulative. *Christian v. Waialua Agr. Co.,* 93 F. 2d 603 (Ninth Circuit); *Sommer v. Carbon Hill Coal Co.,* 107 F. 230 (Ninth Circuit).

Appellant Guilty of Contributory Negligence as a Matter of Law

By proper instructions to which no exceptions were taken, the law of the case was established. The law does not permit appellant to close his eyes to danger and if injured thereby seek a remedy in damages against another (Tr. 224). If appellant knew, or in the exercise of care should have known and realized, that the use of the ladder because of its construction and position against the building involved a danger or risk of injury to himself, then by voluntarily exposing himself to such danger or risk of injury, appellant assumed the risk and cannot recover (Tr. 226). The duty to keep premises reasonably safe applies

only to defects or conditions that are in the nature of hidden dangers and if condition and position of the ladder was obvious or as well known to appellant as to appellee, there could be no recovery (Tr. 226-227). The appellant was required to exercise a degree of care commensurate with his knowledge of dangers incident to the use of portable ladders (Tr. 225).

Regardless of the propriety of any ruling of the trial court during the course of trial, it must be held that under general rules of law and particularly under the law of this case as established by the court's instructions, that the appellant assumed the risk or danger of injury complained of and was guilty of negligence as a matter of law. Such was the final ruling of the trial court (Tr. 21-22).

"It is a general rule of law that when one knows of a danger brought about by the negligence of another, and understands and appreciates the risk therefrom and voluntarily exposes himself to such danger, he is precluded from recovering for resulting injuries." *Hooton v. City of Burley* (Idaho), 219 P. 2d 651 at 654.

The appellant Pehrson testified that as Mr. Hurst ascended the ladder ahead of him he felt the ladder slip to the side and then knew that the ladder was not firmly set upon the ground or firmly affixed to the wall at the top (Tr. 99-101, Ex. 13). He admitted-

ly took no precaution to solidly set the ladder at either top or bottom before ascending the same, admitted that he knew and realized that there was a hazard and risk of injury in ascending the ladder under such conditions, stating that he intentionally "took a chance" that accident and injury would not result (Tr. 101-116, Ex. 13).

Under such circumstances it must be held as a matter of law that appellant was guilty of contributory negligence in failing to exercise reasonable care for his own safety and assumed all risk of injury involved in his use of the ladder under the conditions related. See *Caron v. Gray's Harbor County,* 139 P. 2d 626; *Moody v. Hanlon,* 179 Sou. 164; *Duncan v. Gernert Bros.,* 87 SW 762.

CONCLUSION

We submit that no error was committed upon the trial and that under the evidence, no judgment other than that of dismissal of appellant's action could be sustained in law.

Respectfully submitted,

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